IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 319

FIDELITY ASSURANCE ASSOCIATION, a corporation, Debtor, and CENTRAL TRUST COMPANY, Trustee for Fidelity Assurance Association,

Petitioners,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia, and Ex-Officio Insurance Commissioner of the State of West Virginia; ROSS B. THOMAS and H. ISAIAH SMITH, West Virginia State Court Receivers; BANKING COMMISSION OF WISCONSIN; CHAS. R. FISCHER, Commissioner of Insurance and Permanent Receiver for debtor corporation in and for the State of Iowa; JOHN B. GONTRUM, Insurance Commissioner of the State of Maryland; DEWEY S. GODFREY, Missouri State Court Receiver; L. H. BROOKS, Trustee; FREDERIC LEAKE and A. L. GOLDBERG, Jr., Trustee; and SECURITIES AND EXCHANGE COMMISSION,

Respondents.

Brief of Respondents, Banking Commission of Wisconsin and Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for the State of Iowa in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

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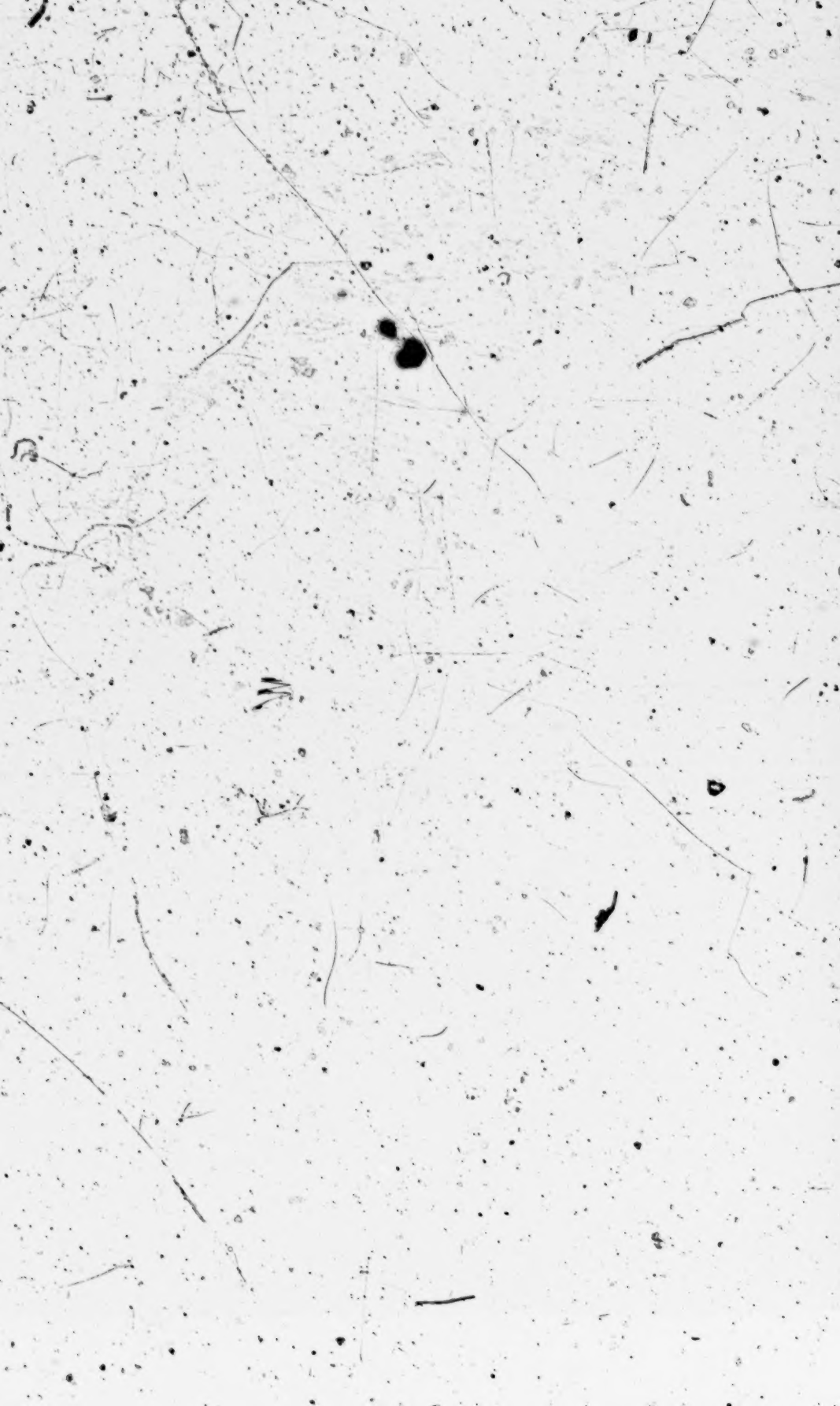

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OPINIONS BELOW

The opinion of the District Court (R. 3) is reported in 42 F. Supp. 973. The opinion of the Circuit Court of Appeals (R. 362) is reported in 129 F. (2d) 442.

STATEMENT OF THE CASE

The statement of the case made by the petitioners in their petition and supporting brief is in many respects complete and accurate. There are certain important omissions, however, to which attention should be invited. To a certain extent this will require repetition of matters stated by petitioners, since it is impossible to supplement their statements in a piecemeal manner and at the same time to give an account of the matter in controversy which is readily understandable.

The supplementary statement which we feel compelled to make is rendered rather difficult by the fragmentary record which has been printed. Some of the material to which we shall refer is not found in the printed record. In cases where such references are made, we refer to statements in the reporter's transcript in the District Court, as, (T. —). Exhibits not found in the printed record are referred to as (Ex. — T. —). Thus, the exhibit and page of the reporter's transcript at which the exhibit was introduced is noted. We recognize that in so identifying matters which are found in the complete unprinted record we are not literally complying with the rules of this Court. On the other hand, we know of no other way in which the matter can be properly presented in view of the petitioners' failure to print a complete record or to arrange for a stipulation covering relevant material.

A. Statement as to the status of petitioner, Fidelity Assurance Association, as an insurance corporation

As appears from the petitioners' statement and from the opinions in both of the lower courts, Fidelity was originally incorporated on April 11, 1911, and with one charter

change in November, 1912, operated as an annuity company until December 31, 1940. It is also pointed out by petitioners that from November, 1912 until December 31, 1940, Fidelity's activity brought it within the scope of art. 9, entitled "Annuity Contracts" of Ch. 33, entitled "Insurance and Annuity Contracts," of the West Virginia Code, which reads in part:

> "No person, association or corporation shall engage in the business of soliciting or receiving deposits or payments on any annuity contract or certificate or annuity bond in fixed and stipulated installments, within this State, without first having obtained from the insurance commissioner a license to do business in this State: Provided, however, That this article shall not be construed as applying to persons, associations or corporations engaged in selling merchandise in installments, insurance companies, foreign or domestic, duly authorized to do business in this State, building and loan associations, national banks and banking institutions organized and authorized to do business under the laws of this State, fraternal insurance societies, or surety companies doing business under the laws of this State. Such license shall be issued for one year, or the fractional part of a year, and for issuing the same a fee of ten dollars shall be charged; and the provisions of section twelve, article two of this chapter [which provide for expiration April 1 each year] shall apply to such license." (Ch. 33, art. 9, sec. 1, West Virginia Code)

On December 31, 1940 Fidelity's articles were amended changing its name to Fidelity Assurance Association, striking from its articles all of its prior corporate purposes and inserting in lieu thereof the following statement of its sole corporate purpose:

"To issue insurance upon the lives of persons and every insurance appertaining thereto and connected therewith, and to grant, purchase and dispose of annuities." (Ex. 24; T. 497)

At the time of this charter amendment the statutes of West Virginia read in part:

"Life insurance companies chartered by and doing business in this State, and empowered to make contracts contingent upon life, may grant and issue annuities, either in connection with or separate from contracts of insurance based upon life risks, and all such annuities heretofore issued by such companies shall be valid." (Ch. 33, art. 3, sec. 7, West Virginia Code)

On the day of its charter change to an insurance corporation, Fidelity was licensed by the Insurance Commissioner of West Virginia to engage in the life insurance business (Ex. 24; T. 497). Under the provisions of West Virginia law, all licenses issued by the Commissioner of Insurance expire on April 1, Ch. 33, art. 2, sec. 12, West Virginia Code, and consequently the insurance company license expired on April 1, 1941. At that time application was made for a new license which was made out but withheld by the Insurance Commissioner (R. 361), who instituted receivership proceedings a few days later.

The insurance company license was issued under what has been termed a "gentlemen's agreement" between the Commissioner and Fidelity that no insurance policies or annuity contracts would be sold pending specific permission by the Commissioner. The Insurance Commissioner stated that the insurance license was granted in order that Fidelity could continue to receive payments under existing annuity contracts (T. 509)

It is conceded by the petitioners in this Court (Pet. for cert. p. 7), and was conceded in both of the lower courts that Fidelity's object in amending its corporate charter was to escape the regulation imposed by the Investment Company Act of 1940.

As expressed by A. L. King, who had been a director, assistant treasurer, vice-president, comptroller and secretary of Fidelity for many years, "Well, with the amended S. E. C. Statute—whatever you call it—coming into force on January 1st, we knew previous to that time that we could not continue to sell our contracts as Fidelity Assurance—Investment Association after that date. We felt, in view of the fact that we had been selling an insured contract for a period of four or five years which appealed to the public, that we could convert our association into an insurance company and broaden our field of activity to include other types of insurance and make a specialty of the sale of an insured contract that would pass the requirements of the State Insurance Commissioner." (T. 1721-1722).

The Circuit Court of Appeals found that the object of the change to an insurance company was to escape the Investment Company Act of 1940 (R. 379).

On the day that the insurance company license was issued, a meeting of Fidelity's board of directors was held. The minutes of the board for that meeting read in part:

"The directors were informed that the Secretary of State of West Virginia certified the amendment authorizing the corporation to change its name to Fidel-

[1]The change to an insurance company was made December 31, 1940. The regulatory provisions of the Investment Company Act of 1940 which had been enacted on August 22, 1940 were to become effective January 1, 1941 as to transactions in annuities by companies such as Fidelity had theretofore been. 15 U. S. C. A. 80a-52.

ity Assurance Association as of December 31, 1940. The directors were also advised that the Auditor and Insurance Commissioner ex-officio of West Virginia has issued a license to the company as a life insurance company on the same date." (P. 156 of Ex. 100; T. 2863)

The minutes further show at the designated page and exhibit that it was moved and adopted that the company, since it was now a qualified and licensed life insurance company, should thereafter assume the insurance feature of its outstanding Series B contracts carrying that feature. The minutes also show that the president was instructed to immediately send out to contract holders a letter, and a rider to be attached to Series B contracts.

The letter and rider read as follows:

"Organized 1911

FIDELITY ASSURANCE ASSOCIATION
Wheeling, West Virginia
Offices in Principal Cities
December 31, 1940

Dear Contract-owner:

It is with pleasure and confidence that we direct your attention to the change in our name and the widening of the scope of our business to that of issuing insurance on the lives of persons. In the future, the company will be known as Fidelity Assurance Association and will offer a complete line of life insurance policies of all types and classes, including life annuities.

These changes enable us, as a qualified legal reserve life insurance company to assume the risks and obligations provided in Section 6 of your contract. As you know, this Section makes available to you insurance covering all

monthly payments not yet made in event of your death. Such insurance protection has, in the past, been procured from a legal reserve life insurance company, but was subject to cancellation, upon due notice, at any time. With the making of your regular monthly payments and the Association assuming the insurance, this condition has been eliminated.

By resolution of the Board of Directors and by the rider enclosed in duplicate, the Association assumes and itself agrees to fulfill and pay the risk and obligations of the insurance policy and of the insurance company mentioned in Section 6 of your contract. The original of the rider is to be signed and attached to your Income Reserve Contract, Series B and the other (the blue one) signed and returned to the Association in the enclosed envelope.

Cordially yours,

F. S. Risley

FsR:GA

F. S. RISLEY, President

N. B. The number of the contract to which the rider is to be attached and be a part is found at the bottom of the rider."

* * * *

"FIDELITY ASSURANCE ASSOCIATION ASSUMPTION OF RISK AND RIDER ATTACHED TO AND A PART OF INCOME RESERVE CONTRACT SERIES "B" NUMBER

The Association, having so amended its charter as to authorize it to issue insurance upon the lives of persons and every insurance appertaining thereto and to grant and dispose of annuities, and to change its name to Fidelity Assurance Association, in consideration of the monthly payments, provided for in the above numbered contract hereby assumes and does itself hereby agree to fulfill and pay all

the risks and obligations of the insurance policy and the insurance company mentioned in Section 6 of said contract.

It is hereby agreed between the Association and the contract holder that this insurance agreement shall become and be a part of said contract and the original shall be attached thereto.

Executed in duplicate at Wheeling, West Virginia this 31st day of December, 1940.

FIDELITY ASSURANCE ASSOCIATION

F. S. Risley
President

Contract Owner."

At the hearing in the District Court Fidelity's officials testified that no insurance contracts had been written by the company. The fact that such contracts had been written was not then known by those opposing the petition. Pending the hearing in the Circuit Court of Appeals, it was discovered that insurance contracts composed of executed riders had been entered into. The matter was brought to the attention of the Circuit Court of Appeals by motion to remand the case, and in connection with the consideration of the motion and the case, counsel for Fidelity, by written stipulation in open court, conceded that 9,802 contracts of insurance had been entered into after December 31, 1940 by reason of execution and return of the riders to which attention has been called (R. 361).

Petitioners now assert at p. 10 of their petition that Fidelity did not assume these insurance obligations because it was never authorized to engage in the insurance business

in West Virginia and the insurance obligations continued to be carried by the Lincoln National Life Insurance Company as they were before. They refer to the "record" at p. 356 in support of these statements.

At the argument in the Circuit Court of Appeals the matter of Fidelity's life insurance license was a subject of considerable controversy. When confronted with a certified copy of the license which had been issued (see Ex. 24, T. 497) and by the direct testimony of the Commissioner of Insurance that it had been issued (T. 500), with no evidence to the contrary, petitioners abandoned all claim that no such license was issued, and the Court found that the license was issued.

So far as appears, Fidelity continued to keep in force in Lincoln National Life Insurance Company the group insurance policy which covered its Series B contracts and for which it exacted payment from the contract holders, and the Court so found.

Aside from the assumption of liability on the 9,802 insurance contracts, Fidelity transacted no new business after it was chartered and licensed as a life insurance company. It issued no further annuity contracts and confined its annuity business to accepting payments on existing contracts, paying out on matured contracts and making contract loans (Op. D. C., R. 11-12).

During this period Fidelity filed proposed forms of new annuity and life insurance policies with the Insurance Commissioner of West Virginia pursuant to the provisions of the law as a condition precedent to the sale of such policies (Op. C. C. A., R. 367), and on January 24, 1941 again amended its charter to reduce its authorized capital stock to $1,000,000 shares of common stock, of a par value of

$8.00 per share. The resolution authorizing the change stated that it was in pursuance of a plan to transact life insurance business outside the State of West Virginia (Op. C. C. A., R. 367).

Of further significance is the fact that Fidelity by letter withdrew its registration with the Wisconsin Banking Commission as an investment company, effective December 31, 1940. It advised the Commission in connection with this withdrawal that it was entering the field of life insurance (Ex. 93, T. 2444).

B. Statement as to Fidelity's good faith in filing the petition for reorganization.

The Circuit Court of Appeals decided that the prior proceedings pending in the state courts would best subserve the interests of Fidelity's creditors. Petitioners seek to have this determination reviewed, but few facts are set forth in the petition as to the nature of the proceedings in the various state courts (such facts were fully developed on the record), and, therefore, in order that the interest and position of these respondents may be made clear, we deem it desirable to point out certain facts as to the nature and history of Fidelity's operations in Wisconsin and Iowa and the nature and history of the proceedings instituted in Wisconsin and Iowa and in other states prior to the filing of debtor's petition for reorganization.

1. The operations and proceedings in Wisconsin

In Wisconsin, Fidelity was licensed to sell its contracts from June 26, 1930 to the close of 1940. It was licensed annually under Chapter 216 of the Wisconsin Statutes (R. 40-41) pertaining to "investment associations." Under this chapter it was subject in Wisconsin to all of the laws of Wisconsin pertaining to foreign building and loan associa-

tions. Sec. 215.38, Wis. Stats. (R. 42), which was applicable to Fidelity, provided that it could not transact business in Wisconsin unless it should

> "* * * have and keep on deposit with the state treasurer, in trust for the benefit and security of all its members in this state, five hundred thousand dollars to be held in trust as aforesaid until all shares of such association held by residents of this state shall be fully redeemed and paid off and until its contracts and obligations to persons and members residing in this state shall have been fully performed and discharged. * * *"

It was also provided that the securities comprising the deposit should be approved by the Banking Commission of Wisconsin, and, further, that whenever the Banking Commission should find that the liability on contracts held by persons residing in Wisconsin exceeded ninety per cent of the deposit, the Commission would require the deposit of additional securities (sec. 215.395, Wis. Stats., R. 43). Its contracts were also subject to the securities law of Wisconsin, Chapter 189, Wis. Stats. The laws of Wisconsin, insofar as pertinent here, under which Fidelity operated and was subject, are shown at R. 40 to 59.

As of April 10, 1941 Fidelity's "net cash liability" on contracts held by Wisconsin residents was $2,342,978.73, while the market value of the securities were, according to Fidelity's figures as of June 6, 1941, $2,619,399.07. A sales value of over $1,000,000 in face amount of contracts per month was reached in Wisconsin, which was one of the five states in which the company had its largest volume of sales (Ex. 48, T. 1116). Approximately six thousand contracts are presently outstanding in Wisconsin (Ex. 34, T.

757) out of the approximately 22,000 to 25,000 "active" contracts outstanding in total (R. 211). In the sale of the contracts in Wisconsin, the Wisconsin deposit law was emphasized (T. 3172), and the greatest stress was laid upon the fact that the company was supervised by the Banking Commission of Wisconsin and had securities on deposit with the State Treasurer there. A large number of the Wisconsin contract holders purchased their contracts upon the representations made to them as to the protection afforded by the Wisconsin law (Ex. 114, T. 3546, R. 65-74).

After advising the Banking Commission of Wisconsin under date of December 31, 1940 that it had become an insurance company and would no longer sell its contracts in Wisconsin, as has heretofore been pointed out, no further contracts were sold there. In fact, the sale of contracts had ceased in Wisconsin and elsewhere some time before this, Fidelity's license having been suspended in most states in 1938 or 1939 (T. 368). Upon the company's ceasing payment of its obligations to contract holders, and on April 14, 1941, three days after the institution of the West Virginia state court proceedings by the Insurance Commissioner of West Virginia, the Banking Commission of Wisconsin took possession of the Wisconsin business and assets of Fidelity under appropriate statutory proceedings, particularly sec. 215.33, Wis. Stats. (R. 60-63) in the Circuit Court for Dane County, Wisconsin. Due notice to Fidelity and its officers was given, as provided by statute. Fidelity entered its appearance therein by counsel, interposed no objection thereto and took no appeal from the action of the Banking Commission of Wisconsin. A certified copy of the Wisconsin proceedings comprises Exhibit 120 of the original record herein. The Banking Commission was and is represented

in the Wisconsin proceedings by the attorney general under provisions of Wisconsin law providing therefor. No fees either for counsel or receivers are being exacted in the Wisconsin proceedings. By operation of law (sec. 215.33 (8), Wis. Stats.) and as provided by the order of April 14, 1941 of the Circuit Court for Dane County (R. 60), title to and possession of all of Fidelity's assets located in Wisconsin were vested in the Banking Commission of Wisconsin "to be administered by the Banking Commission of Wisconsin under the supervision and control of the Circuit Court for Dane County, Wisconsin for the benefit and security of contract, bond or certificate holders, residents of this state * * *". (R. 61). The filing of the notice of taking possession operated, under sec. 215.33 (8), Wis. Stats., as a bar to any other action against Fidelity or its assets in Wisconsin.

Pursuant to court order dated May 16, 1941 substantially all of the Wisconsin contract holders duly filed their claims with the Banking Commission of Wisconsin (Ex. 114, T. 3546, R. 65-74) along with their actual Fidelity contracts (T. 1057).

On May 27, 1941, pursuant to order of the court and with the express consent of counsel for Fidelity, the Banking Commission of Wisconsin liquidated and sold certain of the deposited securities realizing the sum of $1,259,244.04, and these funds are still held by the Banking Commission of Wisconsin (Ex. 120, T. 3803). Of the Wisconsin deposit there remain certain securities which we consider to be the equivalent of cash and which may be readily sold without expense or difficulty, these securities being as follows:

	Par Value
City of Milwaukee— Park 5% 1949	$ 50,000.00
City of Milwaukee— Sewer 5% 1947	30,000.00
City of Milwaukee— Sewer 5% 1948	50,000.00
City of Milwaukee— Sewer 5% 1949	50,000.00
City of Milwaukee— Sewer 5% 1950	25,000.00
United States Treasury— 2⅞—1960-55	160,000.00
United States Treasury— 3¼—1946-44	34,000.00
United States Treasury— ¾ Sept. 1944	800,000.00
	$1,199,000.00

After the Wisconsin proceedings had been commenced and carried forward as above outlined, the Banking Commission was notified on June 9, 1941 by telegram signed by the Central Trust Company of Charleston, West Virginia, that the District Court for the Southern District of West Virginia had on June 6 approved the filing of a petition for reorganization of Fidelity. Subsequently copies of ex parte orders of the District Court dated June 6 and June 10 ordering the Banking Commission of Wisconsin to turn over assets in its possession to the Central Trust Company, were received by the Banking Commission. The Banking Commission did not comply with these purported or-

ders, but voluntarily held the Wisconsin proceedings in abeyance pending the determination of the jurisdiction of the federal court upon the proceedings had on its controversial answer and the answers of the other respondents herein to debtor's petition for reorganization. The Banking Commission has, however, maintained close contact with Fidelity's Wisconsin contract holders and has participated in discussions with other state authorities looking to the facilitation of the administration and distribution of Fidelity's assets in the Wisconsin proceedings as well as in the other state proceedings.

A large number of the Wisconsin contract holders have expressed themselves unequivocally that they are in no way interested in any proposed reorganization proceedings in West Virginia or elsewhere and are desirous of having the Wisconsin proceedings go speedily forward to the end that they may receive their proper share of the funds to be distributed there (Ex. 114, T. 3546, R. 65-74).

2. The operations and proceedings in Iowa

In Iowa Fidelity was granted a certificate of authority by the Auditor of State on or about January 7, 1927 pursuant to Chapter 392, 1927 Code of Iowa (R. 75-78). An initial deposit of $25,000 was made under the pertinent statutes, "guaranteeing the faithful performance of all contracts entered into," and thereafter additional securities were deposited in an amount at all times equal to its liabilities in Iowa. In 1930 Fidelity registered its investment contracts in Iowa under the provisions of Chapter 393.1, Iowa Code, as an issuer-dealer, but failed to secure the renewal of this license in 1936, after which time it was not permitted to sell new contracts in Iowa. In order that

Fidelity might continue to collect and disburse on its outstanding contracts, it filed application in December, 1927 for a permit to do business as a foreign corporation under Chapter 386, 1935 Code of Iowa. The laws of Iowa, insofar as pertinent here, to which Fidelity was subject, are shown at R. 75 to 89.

Fidelity's "net cash liability" to Iowa contract holders was approximately $35,000 and securities were deposited in Iowa of the approximate par value of $42,000. This deposit was made in trust for the purpose of guaranteeing faithful performance of Fidelity's contracts and title to the trust deposit was vested in the Auditor of State and, under the present law, in his successor, the Commissioner of Insurance.

After the commencement of the state court proceedings in West Virginia and on April 16, 1941, the Attorney General of Iowa, on behalf of Charles R. Fischer, Commissioner of Insurance, commenced an action in the District Court for Polk County, Iowa for administration of the Iowa assets in accordance with the provisions of Chapters 392 and 393.1, Code of Iowa 1939, and on May 19, 1941 was appointed permanent receiver in Iowa. The Iowa assets were administered by the Iowa Commissioner of Insurance up to the time Fidelity filed its petition for reorganization, and the Iowa proceedings have been voluntarily held in abeyance since that time. The securities comprising the Iowa deposit are still held by the Commissioner of Insurance there.

3. The proceedings in other states

In a number of other states the state authorities had also commenced appropriate proceedings prior to the filing of the petition for reorganization.

On April 4, 1941 the Auditor and Ex-Officio Insurance Commissioner of West Virginia ordered Fidelity to cease payment on its contracts by reason of the fact that it appeared it could no longer meet its obligations, and on April 11, 1941 the Attorney General of West Virginia, at the instance of the Auditor and Ex-Officio Commissioner of Insurance, instituted insolvency proceedings against Fidelity in the Circuit Court for Kanawha County, West Virginia. Fidelity appeared in this suit, interposed no objection thereto, and receivers of the company's "free" assets were appointed. One of these receivers was later employed by the Central Trust Company to manage Fidelity's affairs in the federal proceedings. The Insurance Commissioner of West Virginia notified the various other state authorities of his action and asked that they institute proceedings with respect to the assets in their respective states (T. 730). The securities deposited in West Virginia are still held by the State Treasurer there, and the Auditor and Ex-Officio Insurance Commissioner of West Virginia is one of the respondents here.

The Attorney General of Ohio, at the instance of the Superintendent of Insurance of Ohio, instituted appropriate proceedings in the Common Pleas Court of Franklin County, Ohio, and filed an answer controverting the allegations of Fidelity's petition for reorganization. Ohio's answer was later withdrawn upon the entry of an order by the District Court herein on October 29, 1941 consenting that the securities on deposit in Ohio should remain there

until such time as a plan of reorganization might be adopted in the federal proceedings but without prejudice to Ohio's status as an intervenor.

The Secretary of State of Illinois, with whom the deposit was made there, commenced appropriate proceedings in the Circuit Court of Sangamon County of Illinois, and the Atttorney General of Illinois filed an answer controverting the debtor's petition for reorganization. This answer was withdrawn upon the entry of an order by the District Court on October 4, 1941 providing that the securities on deposit in Illinois should remain there pending the federal proceedings.

In Tennessee certain contract holders filed a bill in the Chancery Court for Davidson County, Tennessee, to enforce their lien upon the securities deposited with the State Treasurer of Tennessee. These Tennessee contract holders intervened and filed an answer controverting debtor's petition in the federal proceedings and are respondents herein. The deposited securities are still held by the State Treasurer of Tennessee.

In Missouri a receiver was appointed at the request of the Commissioner of Securities there and the Missouri receiver filed an answer controverting Fidelity's petition for reorganization, and is one of the respondents herein. The deposited securities are still held by the Commissioner of Securities of Missouri.

The Insurance Commissioner of Maryland instituted appropriate proceedings there and is one of the respondents herein. The deposited securities are still held by him.

The Securities Commissioner of the State of Kansas entered his appearance in the federal proceedings through counsel. The deposited securities are still held in Kansas.

In all of the states having deposits and where proceedings were not instituted prior to the filing of the petition for reorganization, the appropriate authorities have conferred with the authorities of the other states and are ready to carry on such proceedings as soon as the order of the Circuit Court of Appeals becomes final.

QUESTIONS DECIDED BY THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals decided two propositions of law in determining the case:

1. That Fidelity was an "insurance corporation" within the meaning of Section 4 of the Bankruptcy Act as amended by the Act of June 25, 1910, 36 Stat. 839, 11 U. S. C. A. sec. 22,[1] and therefore excepted from those corporations which are subject to bankruptcy;[2]

2. That at the time Fidelity's petition was filed, prior proceedings were pending which it appeared would best serve the interest of creditors and stockholders and that the petition was subject to dismissal under sections 144 and 146 (4) of Chapter 10 of the Bankruptcy Act; 11 U. S. C. A. 544, 546 (4).[3]

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[1]Appendix 64.
[2]In Chapter 11b proceedings such corporations are excluded. 11 U. S. C. A. 506 (3), App. p. 66.
[3]Appendix 67.

ARGUMENT

I. THE PETITION FOR CERTIORARI AND SUPPORTING BRIEF DISCLOSE NO GROUNDS FOR THE ISSUANCE OF THE WRIT TO REVIEW THE FINDING THAT FIDELITY WAS AN INSURANCE CORPORATION

A. Fidelity was chartered, licensed and did business as a life insurance corporation under the laws of West Virginia

As we pointed out in our statement of the case, Fidelity amended its articles on December 31, 1940, changing its name to Fidelity Assurance Association and changing the statement of its corporate purposes so that thereafter its sole purpose was to issue life insurance and to grant, purchase and dispose of annuities (Ex. 24; T. 497).

We have also pointed out that under the law of West Virginia life insurance companies, in addition to issuing life insurance, are empowered to grant and issue annuities. Ch. 33, art. 3, sec. 7, West Virginia Code.

Fidelity was granted a license to engage in business as a life insurance corporation (Ex. 24; T. 497). Under this license it issued 9,802 life insurance contracts and continued to receive payments on existing annuity contracts, made loans on such contracts, and paid out matured contracts.[1]

There is not one slight doubt but that Fidelity was chartered, licensed and did business in the State of West Virginia as a life insurance company under the insurance

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[1]Insurance corporations licensed to do business in West Virginia are excluded from licensing provisions relating to annuity companies. (See Ch. 33, art. 9, sec. 1, West Virginia Code, set out on p. 3). Fidelity having become a duly licensed insurance company and under such license authorized to deal in annuities, was not thereafter included within the licensing provisions relating to annuity companies. This was recognized by the Commissioner of Insurance when he testified that he licensed the company as a life insurance company in order to permit it to continue such activities with respect to existing annuity contracts (T. 500).

laws of that State after December 31, 1940 and prior to April 1, 1941. Nor, in view of the communication sent out to the Banking Commission of Wisconsin, the minutes of Fidelity's board of directors, and the communications sent out to contract holders, all of which are referred to in our statement of the case, is there the slightest doubt but that Fidelity planned to become a life insurance corporation, and that it thought that it had become such a corporation.

As pointed out in our statement of the case, the petitioners state that Fidelity did not assume any insurance obligations because, as they say, it was not authorized to do so and continued to keep its group policy in force with Lincoln National Life Insurance Company. These arguments and the document upon which they are in part based (Affidavit of F. J. McNulty, R. 356), were considered by the Circuit Court of Appeals and it found that Fidelity was authorized to and did in fact issue insurance contracts.

B. Fidelity's charter purposes were such after the amendment on December 31, 1940 as to constitute it a life insurance corporation according to the generally recognized classification of such corporations by the States of the United States

In the appendix to our brief in the Circuit Court of Appeals we referred to the statutes of many of the states providing for the incorporation of life insurance companies. These statutes are set out at pp. 100-113 of the record and are referred to in the opinion of the Circuit Court of Appeals in a footnote (R. 380).

A study of these statutes discloses that thirty-five states today classify life insurance corporations upon the

basis of a charter power to issue life insurance and to grant, purchase and dispose of annuities.

At the time that life insurance corporations were excluded from the Bankruptcy Act (Act June 25, 1910, Ch. 412, sections 3 and 4, 36 Stat. 839) twenty-eight states so defined their charter purposes.

Of the states which did not in 1910 and do not now so define life insurance corporations, few have a statutory definition of any character.

C. Fidelity's activities after its charter amendment were those of an insurance corporation

After it was chartered and licensed as a life insurance corporation, Fidelity issued contracts of life insurance and continued to deal in annuities to the extent that it received payments, made loans and paid out on existing contracts. The petitioners apparently concede that the issuance of life insurance contracts constitutes a proper activity of a life insurance corporation, but they contended below and apparently contend here that Fidelity's annuity transactions constituted the principal part of its business after its charter change and that this activity transformed it into something other than a life insurance corporation.

Their argument comes down to this: A corporation may, under the laws of West Virginia and of the states of the United States generally, be classified as a life insurance corporation upon the basis of a charter power to deal in life insurance and annuity contracts. On the other hand, if it deals in annuity contracts to a greater extent than it deals in life insurance policies, it is not an "insurance cor-

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[1] In some cases such corporations are also authorized to issue health and accident insurance.

poration" within the meaning of Section 4 of the Bankruptcy Act, even though it deals in annuities pursuant to its charter powers and license as such.

Two observations can be made with respect to this phase of petitioners' argument.

First. All new business transacted by Fidelity as a life insurance corporation was purely a life insurance business in any sense of the word, namely, the issuance of life insurance contracts.

Second. Commercial life insurance corporations have not, in the past history of the United States, and do not now exist except as they have been and are created by the statutes of the several states. There is no common law definition of a life insurance corporation and such corporations do not exist by virtue of any rule of common law.

It would seem, therefore, that where the words "insurance corporation" are used, as in the Bankruptcy Act, with no definition of those words, they must of necessity refer to the only insurance corporations that now or have ever existed, namely, those created by state statute. In order to determine the characteristics of such a corporation, therefore, it becomes necessary to refer to the statutes of the several states by virtue of which they exist.

We have shown that under the law of West Virginia, and under the law of the states generally, life insurance corporations have certain well-defined and understood characteristics. They are corporations authorized to issue life insurance, to grant, purchase and dispose of annuity contracts, and in some cases to issue health and accident insurance. The government of the United States has recognized this classification of life insurance companies in its statutes taxing life insurance companies, 26 U. S. C. A. sec.

201 (a),[1] and in its statutes providing for R. F. C. loans to insurance corporations, 15 U. S. C. A. sec. 605i.[2]

Under their charter powers to deal in annuities, life insurance corporations may issue such annuities for life, upon the basis of mortality tables, or for a certain period, as in the case of Fidelity's annuities.

Carroll v. Equitable Life Assur. Soc. of United States, 9 F. Supp. 223 (D. C., Mo., 1934).

But even where such contracts are based upon mortality tables, they are not, properly speaking, insurance contracts.[3]

It is, nevertheless, recognized that the acivities of life insurance corporations (with charter powers such as those of Fidelity) in dealing in annuities are properly the activities of such companies.

As stated by the Supreme Court of Massachusetts:

> "And the conclusion is irresistible that if the petitioner had issued only contracts for the payment of annuities, it must be deemed to be a life insurance company. If so it would be accurately described as in 'the business of life insurance.' It is none the less so engaged because it also issues policies of life insurance * * *."

Mut. Ben. Life Ins. Co. v. Commonwealth, 227 Mass. 63, 116 N. E. 469, 470 (1917).

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[1] Appendix 68
[2] Appendix 28
[3] Old Colony Trust Co. v. Commissioner of Internal Rev., 102 F. (2d) 380 (C. C. A. 1st, 1939); Rishel v. Pacific Mut. Life Ins. Co. of California, 78 F. (2d) 881 (C. C. A. 10th, 1935); In re Walsh, 19 F. Supp. 567 (D. C. Minn., 1937); Commonwealth v. Metropolitan Life Ins. Co., 254 Penn. 510, 98 Atl. 1072 (1916); State v. Lucas, (Mo.) 153 S. W. (2d) 10 (1941); Curtis v. New York Life Ins. Co., 217 Mass. 47, 104 N. E. 553 (1914); People v. Knapp, 193 App. Div. 413, 184 N. Y. S. 345 (1920), affirmed 231 N. Y. 630, 132 N. E. 916 (1924); Daniel v. Life Ins. Co. of Virginia, (Tex. Civ. App.) 102 S. W. (2d) 256 (1937); State v. Equitable Life Assur. Soc., 68 N. D. 641, 282 N. W. 411 (1938); Northwestern Mut. Life Ins. Co. v. Murphy, 223 Ia. 333, 271 N. W. 899 (1937); State v. Ham, 54 Wyo. 148, 88 P. (2d) 484 (1939).

See also:

Northwestern Mut. Life Ins. Co. v. Murphy, 223 Ia. 333, 271 N. W. 899, 902 (1937);

State v. Lucas, 348 Mo. 286, 153 S. W. (2d) 10 (1941).

Annuities are not insurance but life insurance corporations which are classified as such by virtue of charter power to issue life insurance and to deal in annuities necessarily engage in the activities of life insurance corporations when, pursuant to those charter powers and a license to conduct a life insurance business, they deal in annuities.

D. Petitioners' arguments considered

On page 17 of the brief in support of their petition the petitioners summarize five separate arguments directed to the proposition that the Court should issue a writ of certiorari to the Circuit Court of Appeals by reason of its disposition of the insurance company question. These arguments are elaborated in later portions of their brief. Each of these points will be discussed, but for purposes of clarity we prefer to treat them out of the order in which they are stated by the petitioners.

1. The point (petitioners' point No. 4) that Fidelity was not classified as an insurance corporation under the law of West Virginia

We dispose of this point in our argument beginning at p. 20, *supra*. We shall add nothing here except to point out that the petitioners' claim that Fidelity was not an insurance company under West Virginia law is directed entirely to the status of the corporation prior to the charter amendment on December 31, 1940. We have made no claim

and make none here that Fidelity was an insurance company prior to December 31, 1940.

2. The point (petitioners' point No. 3) that the decision of the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court

Petitioners' argument on this point is based upon the cases of *Bowers v. Lawyers Mortgage Company*, 285 U. S. 182, 52 S. Ct. 350, 76 L. ed. 690 (1932) and *United States v. Home Title Insurance Co.*, 285 U. S. 191, 52 S. Ct. 319, 76 L. ed. 695 (1932).

In those cases corporations were organized under the insurance laws of New York for the purpose of guaranteeing real estate mortgage obligations and engaging in a general real estate mortgage broker's business. The question at issue was whether the corporations were insurance corporations for tax purposes. It was held that one corporation was an insurance corporation and that the other was not. These decisions were rested upon the ground that for purposes of the tax law there under consideration the character of a corporation was to be determined by its activities; that the activities of guaranteeing real estate mortgage obligations were insurance activities and that such activities were predominate in the case of the one corporation but were subsidiary in the case of the other.

A similar real estate mortgage guarantee corporation filed a petition for reorganization under Section 77B of the Bankruptcy Law following the decision in the *Bowers* and *Home Title Insurance Co. cases*. Upon the authority of those cases it was argued that the principal activities of the company were not those of guaranteeing mortgages and that consequently it was not an insurance corporation within the meaning of the Bankruptcy Act. The Second

Circuit Court of Appeals held that the *Bowers* and *Home Title Insurance Co* cases were inapplicable and that considerations which obtained for purposes of administering the taxation laws involved in those cases were not apposite in determining the character of a corporation for the purposes of the Bankruptcy Law.

In re Union Guarantee & Mortgage Co., 75 F. (2d) 984 (C.C.A. 2d, 1935).

Certiorari was denied by this court, *Union Mortgage & Guarantee Company v. Van Schaick, etc.*, 296 U. S. 594, 56 S. Ct. 142, 80 L. ed. 421 (1935). If it did not consider that a writ of certiorari was necessary to resolve any supposed conflict with the *Bowers* and *Home Title Insurance Co.* cases raised by *In re Union Guarantee & Mortgage Co.*, 75 F. (2d) 984 (C. C. A. 2d, 1935), it becomes difficult to determine just how any such supposed conflict can be asserted as the basis for the issuance of a writ in this case. But whatever may have been the situation with respect to any conflict raised with the *Bowers* and *Home Title Insurance Co.* cases by the *Union Guarantee & Mortgage Co.* case, there is no such conflict in the present case.

Those cases dealt with insurance corporations of an entirely different character than that of a life insurance corporation. So far as life insurance corporations are concerned, they are defined for purposes of federal taxation as an "insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds." 26 U. S. C. A. sec. 201 (a). True enough,

a principal activities test is applicable in the taxation of life insurance companies, but we may note parenthetically that annuities and life insurance are recognized as life insurance activities for purposes of taxation. Consequently, there is no room for a contention that the activity of dealing in annuities, even if it constituted the principal portion of a life insurance company's business, would exclude it from the life insurance classification.

3. The point (petitioners' point No. 5) that there is a conflict with decisions of other circuit courts of appeal

It is a fair criticism of petitioners' argument on this point that they ignore the facts and the decision involved in the present case and for the most part confine themselves to an attempted showing that conflicts exist in other cases to which they refer. Assuming that there may be conflicts in some of the decisions with respect to the rationale employed in determining whether a corporation is to be excluded from bankruptcy under Section 4, it would nevertheless appear that some showing should be required that a decision by this court in the case at bar would resolve any such conflicts as might exist. If there is no such conflict applicable to the facts involved in the case at bar, then obviously the court could hardly determine it.

No circuit court of appeals decision laying down principles applicable in determining whether a corporation is a "municipal, railroad, insurance or banking corporation" or "a building and loan association," within the meaning of Section 4 of the Bankruptcy Act, 11 U. S. C. A. 22, has determined a case in conflict with the determination reached by the court below.

The decision of the court below is in accord with cases such as *In re Union Guarantee & Mortgage Co.*, 75

F. (2d) 984 (C. C. A. 2d, 1935). The decisions of other Circuit Courts of Appeal employing the rationale of that case are set out in the opinion of the circuit court of appeals and they, likewise, are consistent with its finding. In fact, they would be inconsistent with any other finding. The rationale of the *Union Guarantee & Mortgage Co.* case is that the status of a corporation as an insurance or banking corporation is to be determined according to the classification of the corporation under the law of the state of its incorporation.

The decision in *Gamble v. Daniel*, 39 F. (2d) 447 (C. C. A. 8th, 1930) contains reasoning which, to some extent, is inconsistent with the reasoning in *In re Union Guarantee & Mortgage Co.*, 75 F. (2d) 984 (C. C. A. 2nd, 1935), and it is conceivable that a case might arise where the result would vary, depending upon whether the reasoning of the one case or the other were to be applied. In the *Gamble* case the question at issue was whether a corporation was a "banking corporation" and as such excepted from Section 4 of the Bankruptcy Act, 11 U. S. C. A. 22. The court held that "banking corporations" meant corporations which were authorized by the laws of their creation to do a banking business and that a banking business consisted of the doing of those things which, in the ordinary conception, were done by banks at the time banking corporations were excluded from bankruptcy (1910). The court held that the corporation involved in the case was not a banking corporation, since it had no power to receive deposits and since such power was in common understanding an essential attribute of the banking business.

The court also held that the corporation was not a banking corporation within the meaning of the state statutes pursuant to which it was created and existed.

It may be noted that the only instance in which a conflict could arise between the *Union Guarantee & Mortgage Co.* case and the *Gamble* case would be where a state were to classify a corporation upon the basis of charter purposes substantially differing from those which were commonly accepted as identifiable with such corporations in 1910. No such case is presented here nor do we know of a case where the question has been presented. It was specifically held by the Circuit Court of Appeals in the present case that Fidelity was an insurance corporation both upon the basis of its classification by West Virginia and by its classification by the laws of the states of the United States generally in 1910.

As we have pointed out in a preceding portion of our argument, commercial insurance corporations did not exist in 1910 and do not exist now except as they are created and their purposes defined by state statutes. Consequently, when in 1910 the laws of the states generally identified life insurance corporations as those corporations authorized to transact business in life insurance and annuities, they necessarily impressed upon the words "life insurance corporation" a commonly accepted meaning.

We are wholly unable to recognize any conflict between the present case and *In re Prudence Co.*, 79 F. (2d) 77 (C. C. A. 2nd, 1935). In that case the question at issue was whether a corporation formed under the New York banking law was a banking corporation within the meaning of Section 4. The New York law was entitled "An act in relation to banking corporations * * * and corporations under the supervision of the banking department." The court held that corporations other than banking corporations could be formed under the New York banking

law,—that Prudence Co. had not acquired the powers of a banking corporation as those corporations existed under New York law and generally, and that consequently it was not a banking corporation excluded from the Bankruptcy Act. Against the claim that the Prudence Company was an insurance corporation, if it was not a banking corporation, the court held that notwithstanding the nature of its business was the same as that done by *Union Guarantee & Mortgage Co.* (75 F. (2d) 984 (C. C. A. 2nd, 1935)) it was not an insurance corporation since it was not organized under the insurance law and was not such in common parlance.

Isolated portions of the opinions in the *Union Guarantee & Mortgage Co.* case and the *Prudence Co.* case, may be shown to be inconsistent with each other upon careful examination. So far as the actual holding of the cases go, there is no inconsistency. Further than that, there is no inconsistency between the holdings of either of the cases or anything that is said in them, and the holding of the Court in the present case.

We have already analyzed the *Union Guarantee & Mortgage Co.* case in its relation to the present one. The consistency of the *Prudence Co.* case is clear. Here the corporation was regarded as an insurance company because it was classified as such by West Virginia and possessed and exercised the powers customarily identifiable with life insurance corporations. There is not one sentence in the *Prudence* case inconsistent with such a holding.

Petitioners seem to imply that the Circuit Court of Appeals held Fidelity to be an insurance corporation by reason of the fact that it was supervised by the Commissioner of Insurance. Thus, they say it is contrary to the

Prudence case and to *Capital Endowment Co. v. Kroeger*, 86 F. (2d) 976 (C. C. A. 6th, 1936). This claim is without foundation. There is not the slightest suggestion in the Court's opinion that Fidelity was classified as an insurance corporation upon any such basis. It may be significant that petitioners point to no language to that effect in the opinion.

The petitioners suggest that the holding below conflicts with *Clemons v. Liberty Savings & Real Estate Corporation*, 61 F. (2d) 448 (C. C. A. 5th, 1932). In that case the claim was made that a corporation seeking an adjudication through bankruptcy was either a banking corporation or a building and loan association and, therefore, excluded from bankruptcy under Section 4, 11 U. S. C. A. 22. The Court held that the corporation was not organized as a banking corporation under the state law and that if it occasionally did a banking business, its acts were *ultra vires* and could not operate to make it a bank within the meaning of the Bankruptcy Law. It further held that the corporation was neither organized to do a general savings and loan business nor did such a business as is usually conducted by building and loan associations. As stated by the court (p. 450):

> "It is evident that appellee was organized to do a general savings and loan business, something less than either a bank or a building and loan association. * * *"

There is nothing in the case which is at variance in the slightest degree with the holding of the Court in the present case.

Petitioners' principal effort in endeavoring to spell out a conflict between the case now before the Court and other

decisions is directed toward a claim that some of the other decisions establish an "activities doctrine" to which the present decision does not conform. Their conception of such a doctrine is that the status of a corporation as a bank or insurance corporation is to be determined both by reference to its charter powers and its activities under such powers. Thus, they argued in the Court below that if the charter powers of a corporation authorize activity both within and without the "excepted" fields (apparently it is the thought that the insurance field rather than insurance corporations is excepted from the Bankruptcy Act) and if the predominate business actually conducted lies in a field other than the excepted field, the corporation is not excluded from the Bankruptcy Act.

There is no Circuit Court of Appeals decision holding that the status of a corporation as an insurance, banking, municipal, railroad, or building and loan corporation, within the exclusion clause of Section 4 of the Bankruptcy Act, 11 U. S. C. A. 22, is to be determined by reference to corporate activities in addition to a consideration of charter powers. This is undoubtedly accounted for by the fact that the corporations in question, at least in modern times, are closely regulated, and conform to fairly uniform patterns with respect to charter powers denominating their business fields. This is certainly true in the case of life insurance corporations. Thus it may be said that in general corporations within the excepted classes are recognized as such by reason of the fact that their charter powers authorize certain activities. Consequently, when they engage in such activities the question as to whether their character is to be determined by their charter powers or by their activities is academic.

A case might possibly arise such as that referred to by way of illustration in *In re Supreme Lodge of the Masons Annuity*, 286 F. 180 (N. D. Ga. 1923), where an ancient railroad charter granted by the State of Georgia authorized the Georgia Railroad and Banking Company to conduct both a railroad and a banking business. If such a corporation were to do nothing under its charter other than to engage in the railroad business, could it be said to be a banking corporation? If such a case were to arise, then it might well be that cases such as *In re Roumanian Workers Educational Ass'n.*, 108 F. (2d) 782 (C. C. A. 6th, 1940), and *In re Kingston Realty Co.*, 160 F. 445 (C. C. A. 2d, 1908) dealing with the question as to what constitutes a moneyed, commercial or business corporation within the meaning of Section 4, and as to whether a corporation was principally engaged in the lines of endeavor which characterized the corporations subject to bankruptcy prior to the 1910 amendment, could be resorted to by way of analogy to deal with the situation. However, as we have said, no such case has yet found its way into a Circuit Court of Appeals in relation to the problem at issue and no such case is presented here, whether regard be had both to Fidelity's life insurance and annuity activities after January 1, 1941, or only to its life insurance activities after that day. The activities were those of a life insurance corporation both under the law of West Virginia and in the commonly accepted meaning of that term.

The argument in relation to a conflict between the decision of the Court in the present case and the decisions of other Circuit Courts of Appeal, by reason of the foregoing, necessarily points to the conclusion that the present decision is not in conflict with other decisions and that there

is no conflict even as among the other decisions when they are considered with respect to the facts involved.

4. The point (petitioners' point No. 1) that the Investment Company Act of 1940 has classified corporations such as Fidelity as other than life insurance corporations

a. The point is not open here as it was not raised in the court below

This point cannot afford any basis for issuance of the writ as it was not raised in the Circuit Court of Appeals and is therefore, except in extraordinary circumstances (none of which are shown), not open in this Court. *McGoldrick, etc. v. Compagnie Generale Transatlantique*, 309 U. S. 430, 60 S. Ct. 670, 84 L. ed. 849 (Mar. 25, 1940).

b. In any event the point is without merit as Congress in the Investment Company Act of 1940 did not classify GENERALLY *but expressly for the limited purposes of certain subsections of that Act and two sections of the Bankruptcy Act neither of which sections are germane to or involved in the case at bar*

Petitioners rest their whole point upon the assumption that the Investment Company Act of 1940 has classified corporations such as Fidelity as other than life insurance corporations and that where Congress has thus classified, for purposes of federal legislation, the federal courts should follow the classification so made. Such argument is entirely meaningless unless the classification involved is related to *purpose* of the classification. Stress is also laid upon the fact that the classification made by the Investment Company Act of 1940 was made for the purposes, among others, of the Bankruptcy Act. Here again, the argument is mean-

ingless unless it is related to such portions of the Bankruptcy Act as were affected by the classification.

It is true that in the Investment Company Act of 1940 Congress has created and defined the term "face amount certificate" 15 U. S. C. A. 80a-2 (a) (15)[1]. As so defined the term would include annuity contracts whether for life or for a stated period. The terms "investment company" and "face amount certificate company" are also created and defined by the Act. 15 U. S. C. A. 80a-3 (a) (2) and 15 U. S. C. A. 80a-4 (1).[2] As so defined a "face amount certificate company" which is a species of an investment company, would include all life insurance companies were it not for the exclusion made by 15 U. S. C. A. 80a-3 (c) (3)[3] and 80a-2 (a) (17)[4].

These sections define and exclude insurance companies from the definition of "investment companies" and "face amount certificate companies." As so defined and excluded, insurance companies are those whose primary and predominate business activity is the writing of insurance and which are subject to supervision by the insurance officials of the various states.

For what purpose are these classifications and definitions created? Each and every one of them are prefaced in the Investment Company Act by the express language, "When used in this subchapter and sections 72 (a), last sentence, and 107 (f) of Title 11." These are the *express* and *only* purposes subserved by these definitions in the Investment Company Act.

There can be no question but that the Investment Company Act of 1940 intended to regulate as "face amount

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[1]Printed in petitioners' brief, p. 20.
[2]Printed in petitioners' brief, pp. 20-21.
[3]See appendix this brief, pp. 67-68.
[4]Printed in petitioners' brief, pp. 22-23.

certificate companies," for the purpose of *that Act*, life insurance companies whose annuity business predominates over the writing of insurance risks, but in the light of the foregoing limited express purposes of these definitions, it is not perceived wherein any tenable argument can be advanced that the Congress in the Investment Company Act evidenced any intention to adopt a "definition" of an insurance company applicable *generally* to the administration of federal law and federal statutes. Quite to the contrary, as we have already pointed out, for purposes of taxation and for R. F. C. loans, no attempt is made to classify life insurance corporations upon the basis of the predominance of their activity as between writing annuities and life insurance policies. 26 U. S. C. A. 201 (a); 15 U. S. C. A. 605i.

As a matter of fact, under the definition of a life insurance company made for tax purposes by 26 U. S. C. A. 201 (a), an insurance company could do 95% of its business in annuity contracts and 5% in life insurance policies. No distinction is made whatsoever between the writing of insurance and the writing of annuities, so long as the reserve funds held for the fulfillment of either or both forms of contract comprise more than 50% of the total reserves.

There is but one conclusion that is possible with respect to the intention of Congress in classifying insurance companies. There is no such thing as a uniform congressional classification of life insurance companies. The definition varies *for the purposes* of particular acts. Such a company is one thing for taxation, another thing for R. F. C. loans, another thing for investment company regulation and possibly still another thing for purposes of other federal statutes.

The case at bar is concerned with the status of Fidelity as a corporation eligible to the benefits of the Bankruptcy Act. It is not concerned with Fidelity's status under the Investment Company Act. It is concerned only with whether Fidelity is an "insurance corporation" within the meaning of sec. 4 of the Bankruptcy Act (11 U. S. C. A. 22).[1] This section excludes insurance corporations and other named corporations from the provisions of the Bankruptcy Act. This section was not amended or even referred to in the Investment Company Act of 1940. As we have heretofore shown, pp. 28-34 this brief, there are certain recognized tests for determining whether a corporation is an insurance corporation within the exclusion clause of sec. 4 of the Bankruptcy Act. We have shown that under these tests Fidelity must be classified as an insurance company under this exclusion clause of the Bankruptcy Act. If the Congress was not content with these recognized legal tests for determining a corporation's status as an insurance company under this exclusion clause of the Act, it would have been a simple matter for it to have made its classifications and definitions in the Investment Company Act applicable to this exclusion clause of the Bankruptcy Act. The Congress had its attention specifically directed to the Bankruptcy Act and chose to amend that Act in two small particulars only, neither of which are germane to or involved in the case at bar.

Petitioners do not even assert that the exclusion clause (sec. 4 of the Bankruptcy Act) was impliedly amended by the Investment Company Act of 1940. It would do violence to every known rule of statutory construction to so assert as the Act upon its face shows that Congress had its atten-

[1] Appendix this brief, p. 64

tion directed to the Bankruptcy Act and deliberately chose to make its classification and definitions of significance in relation to bankruptcy only with respect to two named sections of that Act, namely secs. 72 (a), last sentence, and 107 (f) of Title 11.

The Investment Company Act of 1940 amended the Bankruptcy Act in two minor respects. It added the last sentence to sec. 72 (a) and sec. 107 (f) Title 11, U. S. C. A.[1] Sec. 107 (f) obviously is not applicable to Fidelity as it relates exclusively to deposits made by a face amount certificate company with a depository to secure the holder of any security sold by or on behalf of the debtor on or after January 1, 1941. In the case at bar, none of the states hold any such deposits. Furthermore, neither this section nor the last sentence of sec. 72 (a), Title 11 U. S. C. A., dealing with the appointment of a trustee for face amount certificate companies even purport to make *all* face amount certificate companies as defined in the Investment Company Act eligible for bankruptcy or to state in any way, shape or manner *what* "face amount certificate companies," as defined in the Investment Company Act of 1940, are eligible for bankruptcy.

Congress deliberately accepted the existing law as to what persons or corporations are eligible to the benefits of the Bankruptcy Act and made only two minor administrative changes in relation to administration of the assets of a "face amount certificate company" as defined in the Investment Act, if the company is otherwise eligible for and subject to the bankruptcy law. The Congress simply recognized that some "face amount certificate companies," as defined in the Investment Company Act, would be eligible

[1] Appendix this brief, pp. 64-66.

for and subject to the bankruptcy law and that some would not be. As to the former, the Congress made two minor changes in the administration of the estate of a bankrupt face certificate company. As to the latter, the Congress made no change. It is one thing to say that all "face amount certificate companies," as defined in the Act, may be adjudged bankrupts. It is another thing to say that all "face amount certificate companies" as defined in the Act which are eligible for and have been adjudicated bankrupts shall be administered in a certain way. The Congress deliberately elected the latter.

5. The point (petitioners' point No. 2) that a federal question is presented which has not been but should be settled by this Court

To some extent this contention is simply a restatement of other contentions which have been advanced under different headings. The petitioners claim, for example, that the Court should settle the questions because of conflict with decisions of other Circuit Courts of Appeal (which we have shown does not exist) and because of a conflict with the decisions of this Court relating to the administration of tax laws (which we have shown does not exist).

The only other basis which petitioners assert in their claim that the Court should determine a question which has not been and should be settled, is contained in the following extract from their brief:

> "Considering the variety of powers that are contained in the charters of the many corporations organized under the varying laws of the several States, the multiplicity of activities frequently engaged in by a single corporation, the differences in the laws of the several States relative to the issuance of corporate chart-

ers, together with the expanding field of Federal legislation, it is inevitable that questions of this general type will recur frequently. We believe that the principles of classification of corporations within the purposes of the Bankruptcy Act and especially the reorganization provisions thereof, Chapter X, should be settled by this Court." (Petitioners' brief, p. 25.)

It is a complete answer to the argument so advanced by petitioners that there is no such thing as a variety of powers contained in the charters of life insurance corporations under the laws of the several states. Neither is there a multiplicity of activities engaged in by life insurance companies under the laws of several states. There is a singular uniformity in the charter powers and activities of life insurance corporations provided for by the states of the United States and no decision which this Court could hand down could clarify the problem to any greater extent than it is now clarified. Every Circuit Court of Appeals decision, and so far as we know every District Court decision, construing Section 4 of the Bankruptcy Act, 11 U. S. C. A. 22, would agree that a life insurance corporation chartered to deal in life insurance and annuities under a state law providing for the incorporation of life insurance companies,—which is licensed as such, and which is engaged in the forms of enterprise authorized by its charter, is an insurance corporation.

It will be time enough for this Court to lay down a rule for the guidance of the bench and bar when a factual case is presented, indicating a need for such guidance. No such case is presented here.

II. THE PETITION AND SUPPORTING BRIEF DISCLOSE NO GROUNDS FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO REVIEW THE DETERMINATION OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT THAT FIDELITY'S PETITION FOR REORGANIZATION WAS NOT FILED IN GOOD FAITH

A. The decision of the Circuit Court of Appeals that the prior proceedings pending in the state courts would best subserve the interests of creditors is a determination based upon an examination and appraisal of the facts in this particular case

Section 146 of Chapter 10, 11 U. S. C. A. sec. 546, insofar as material to this point, provides:

> "Without limiting the generality of the meaning of the term 'good faith', a petition shall be deemed not to be filed in good faith if—
>
> "(1) * * *
>
> "(2) * * *
>
> "(3) * * *
>
> "(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding."

The determination of the Circuit Court of Appeals for the Fourth Circuit under subsection (4) of Section 146 that the proceedings instituted in the state courts of West Virginia and elsewhere would best subserve the interests of creditors is a conclusion arrived at upon examination of questions of fact in this case. The Circuit Court of Appeals, of course, had no occasion to inquire as to which

proceedings would best subserve the interests of Fidelity's stockholders because, as stated in the petition for reorganization and as fully conceded by all parties in the case, Fidelity is wholly insolvent in any sense of the word and the stockholders have no equity whatever to be dealt with in any form of proceedings.

It should be further borne in mind that, as both the Circuit Court of Appeals and the District Court found, there is no reasonable prospect of the company being reorganized as a going concern, but, as stated by the Circuit Court of Appeals (R. 383), "only the immediate need of a liquidation of the company's assets for the benefit of the contract holders." At the argument in the Circuit Court of Appeals it was freely conceded by counsel for the Securities and Exchange Commission that the chances were practically 100% against Fidelity's ever being reorganized as a going concern.

As stated in petitioners' brief herein, Fidelity's aggregate assets amount to, in round figures, $21,100,000. Of these total assets, $20,056,680.27 consist of securities on deposit with the states, $556,467.51 in undeposited securities, and approximately $500,000 in cash (R. 366). The remaining assets consist of the home office building at Wheeling, West Virginia and several parcels of real estate of small value in relation to the value of the deposited securities. It may be safely said that Fidelity's assets are from 95 to 98 per cent composed of the securities on deposit with the states.

The sole question which the Circuit Court of Appeals had for determination under subsection (4) of Section 146 was whether or not, in view of the purpose to be accomplished, that is, the sale of the deposited securities,

and the distribution of the cash proceeds to the contract holders as their respective rights thereto might appear, the interests of such contract holders would be best subserved by the continuance of the state court proceedings already commenced under the statutes of the various states expressly adapted to that purpose.

This court has frequently held that it will not grant certiorari to review determinations of fact or determinations of fact and law grounded upon factual considerations.

Southern Power Co. v. North Carolina Public Service Commission, 263 U. S. 508, 44 S. Ct. 164, 68 L. ed. 413 (1924);

United States v. Johnston, 268 U. S. 220, 45 S. Ct. 496, 69 L. ed. 925 (1925);

Houston Oil Co. of Texas v. Goodrich, 245 U. S. 440, 38 S. Ct. 140, 62 L. ed. 385 (1918);

Charleston S. C. Mining & Mfg. Co. v. United States, 273 U. S. 220, 47 S. Ct. 349, 71 L. ed. 618 (1927).

This rule has been uniformly adhered to by the denial of writs of certiorari in cases where the writ was sought to review determinations upon the issue of good faith in Section 77B proceedings.

First National Bank v. Conway Road Estates Co., 94 F. (2d) 736 (C. C. A. 8th, 1938) (reversing District Court on the issue of good faith in 77B proceedings); cert. den. 304 U. S. 578, 58 S. Ct. 1047, 82 L. ed. 1541;

Price v. Spokane Silver and Lead Co., 97 F. (2d) 237 (C. C. A. 8th, 1938) (reversing District Court on issue of good faith in 77B proceed-

ings); cert. den. 305 U. S. 626, 59 S. Ct. 88, 83 L. ed. 401;

In re Mount Forest Fur Farms of America, 103 F. (2d) 69 (C. C. A. 6th, 1939) (sustaining District Court on issue of good faith in 77B proceedings); cert. den. 308 U. S. 583, 60 S. Ct. 105, 84 L. ed. 488.

B. No principles as to the application of subsection (4) of Section 146 of Chapter 10 to control in future cases would result by a review in this Court of the decision of the Circuit Court of Appeals on this point.

Petitioners seek to draw some parallel between the present case and the case of *In re Marine Harbor Properties*, 125 F. (2d) 296 (C. C. A. 2nd, 1942), in which certiorari was granted in 86 L. ed. (adv.) 729. They suggest that in the *Marine Harbor* case the same question as to good faith is involved as in this case, and that because in the *Marine Harbor* case properties situated in only one state were involved and because in this case properties situated in a number of states are involved, that the disposition of the *Marine Harbor* case in this Court will not determine the principles involved in this case. We are in full accord with petitioners' views that the decision in the *Marine Harbor* case will determine no principles apropos of this case, not, however, for the reason that in the *Marine Harbor* case the properties were situated only in one state, but for the reason that the question of law decided by the Circuit Court of Appeals in the *Marine Harbor* case bears no resemblance whatsoever to the question decided in this case under the provisions of subsection (4) of Section 146 of Chapter 10. The Circuit Court of Appeals in the *Marine Harbor* case

distinctly pointed out (125 F. (2d) 299) that the reason it dismissed the petition for lack of good faith was not for the reason expressed in subsection (4) of Section 146 but for "a special instance of a lack of good faith flowing from the personal disqualification of the debtor." The court in that case followed its decision in *Brooklyn Trust Co. v. Rembaugh*, 110 F. (2d) 838 (C. C. A. 2nd, 1940), the rationale of the case being fully expressed in its opinion as follows (125 F. (2d) 299):

> "A majority of the court is of the opinion that the Rembaugh case should be given effect here to prevent a debtor, who has assented to a plan which is being supervised by the state court in reorganization proceedings still pending there, from flouting that jurisdiction by filing a petition in the district court. The applicable principle, as was said in the Rembaugh case, is not an absence of good faith in the filing of the new petition in the broad meaning of those words but a special instance of a lack of good faith flowing from the personal disqualification of the debtor. Section 146, 11 U. S. C. A. sec. 546, expressly disclaims any limitation upon the generality of the meaning of good faith and *subsection 4 of that section is but one special instance of what will show a disabling absence of it on the part of a debtor and is not to be confused with what controls here.* * * *" (Emphasis supplied)

The case of *In re Paloma Estates*, 126 F. (2d) 72 (C. C. A. 2nd, 1942) for review of which petitioners state a petition for certiorari has been filed, is somewhat similar to this case since the petition was dismissed because the court found that the prior proceedings would best subserve the interests of creditors within the meaning of subsection (4) of Section 146 of Chapter 10. Judge Clark, dissenting in that case, suggested that since the court had only affi-

davits before it and no real evidence, a more searching inquiry should have been made. Judge Clark also felt that the District Court which was affirmed by the Circuit Court had laid undue stress on the estoppel of the debtor under the doctrine of the *Rembaugh* case. In the *Marine Harbor* case, Judge Frank, dissenting, pointed out that where stockholders have no equity, under subsection (4) of Section 146 stress should be placed upon the interests of creditors.

Regardless of the merits of the "debtor estoppel" theory which was the basis of the Circuit Court of Appeals decision in the *Marine Habor* case and which was the basis, in part, of Judge Clark's dissenting opinion in the *Paloma Estates* case, we are in the fullest accord with the statements of each of these dissenting judges that under subsection (4) of Section 146 a searching inquiry should be made and the evidence fully developed to determine which proceedings are in the best interests of creditors. There can be no question in the present case that all of the facts in this regard were fully and exhaustively explored in the protracted hearing and that such facts were fully and exhaustively considered by the Circuit Court of Appeals in arriving at its determination under subsection (4) of Section 146 that the state court proceedings would best subserve the interests of creditors under the circumstances of this case.

It is idle to suggest that a review by this Court of the determination of the Circuit Court of Appeals as to which type of proceedings will best subserve the interests of creditors under subsection (4) of Section 146, made after the fullest possible presentation and review of the facts bearing upon this determination, will serve to lay down any guiding principles for future cases where the facts will inevitably be widely divergent from the facts in the case at hand.

Petitioners also quote language from the opinion in *In re National Surety Co.*, 7 F. Supp. 959 (D. C., N. Y., 1934) as being apposite here. Suffice to say that in that case the assets securing the company's debts did not consist of negotiable securities deposited with state authorities which only remain to be sold and the proceeds distributed in order that the creditors may have the fullest possible benefit therefrom.

C. The Circuit Court of Appeals did not decide that reorganization within the meaning of subsection (3) of Section 146 of Chapter 10 excluded a "slow and orderly liquidation"

Petitioners in their brief ask the question: "Does the record show that it is unreasonable to expect that a plan of reorganization can be effected?" By propounding such query petitioners seem to indicate their belief that the Circuit Court of Appeals predicated its decision in this case on subsection (3) of Section 146 of Chapter 10 wherein it is provided that a petition shall not be deemed filed in good faith if "it is unreasonable to expect that a plan of reorganization can be effected." Petitioners then suggest that a factual inquiry should be made by this Court as to such matters, and then assert the claim that the Circuit Court of Appeals entertained as its concept of reorganization as used in subsection (3) of Section 146 the concept that it must be shown in order to avoid dismissal of the petition thereunder that Fidelity can be rehabilitated as a going concern carrying on its business in substantially the same manner as it had previously done.

If the Circuit Court of Appeals had in any way predicated its decision upon subsection (3) of Section 146, we might reasonably inquire whether this Court would be

moved to grant certiorari to examine the multitudinous facts and circumstances bearing upon petitioners' propounded question. However, the Circuit Court of Appeals did not rest its determination that the petition should be dismissed upon subsection (3) of Section 146 but solely upon the provisions of subsection (4) of Section 146. The Circuit Court of Appeals did state in its opinion (R. 383):

> "* * * We think it is our duty to review the situation realistically, and when this is done there appears to be no reasonable hope of a reorganization of the business as a going concern, but only the immediate need of a liquidation of the company's assets for the benefit of the contract holders. Obviously there will be nothing left for these stockholders."

Examination of the District Court's opinion reveals that it in effect also held it was not reasonable to expect that Fidelity could be reorganized as a going concern. The Circuit Court of Appeals further said in its opinion (R. 384):

> "* * * The facts underlying the whole situation are so clear that even the parties in this case who insist upon reorganization under the Bankruptcy Act hold out little hope of a resumption of the business as a going concern, and content themselves for the most part with the argument that reorganization in the statutory sense includes 'a slow and orderly liquidation.'
>
> "But, it is said that even if liquidation is inevitable, the interests of creditors would be best served by a retention of the case in the federal court * * *."

The Circuit Court of Appeals then went on to demonstrate and find that the interests of creditors would in fact, under the circumstances here present, best be subserved by the prior proceedings in the state courts, the entire de-

termination being predicated solely upon the grounds set forth in subsection (4) of Section 146. The Circuit Court of Appeals did not in any way express an opinion as to the merits of petitioners' contentions that the claimed possibility of a "reorganization" being effected in the federal court by means of some unspecified type of "slow and orderly liquidation" would be sufficient under subsection (3) of Section 146 to sustain the federal proceedings.

Petitioners, upon the assumption that the Circuit Court of Appeals has in some way expressed itself as opposed to their contentions in this regard, cite a number of cases where in federal reorganization proceedings plans of reorganization were adopted providing for the formation of holding companies to liquidate the debtor's assets over a long period of time for the benefit of creditors, these cases being:

In re Central Funding Corp., 75 F. (2d) 256, 259 (C. C. A. 2nd, 1935);

In re Mortgage Securities Corp., 75 F. (2d) 261 (C. C. A. 2nd, 1935);

Continental Insurance Company v. Louisiana Oil Refining Corp., 89 F. (2d) 333, 336 (C. C. A. 5th, 1937);

R. L. Witters Associates v. Ebsary Gypsum Company, 93 F. (2d) 746, 748 (C. C. A. 5th, 1938);

In re Porto Rican American Tobacco Company, 112 F. (2d) 655, 657 (C. C. A. 2nd, 1940);

and another case is cited which holds that under Section 77B the organization of a successor corporation was not without the purview of reorganization plans thereunder:

Capital Endowment Company v. Kroeger, 86 F. (2d) 976, 979 (C.C.A. 6th, 1936).

Whatever might have been done in such cases, the Circuit Court of Appeals concluded that for the purpose of what is to be done in this case, namely, the sale of negotiable securities and the distribution of the proceeds thereof to creditors, dismissal of the petition was required under the provisions of subsection (4) of Section 146. The decision of the Circuit Court of Appeals upon the good faith question in this case rests solely upon that subsection.

D. The conclusion of the Circuit Court of Appeals is obvious under the facts and a review of its decision would serve only to prolong needless litigation to the irreparable damage of contract holders

Petitioners have never in this case challenged in the slightest degree the validity of the state laws under which securities were deposited in trust for the benefit of creditors in each of the respective states in order that Fidelity might be permitted to carry on its business there. Indeed, to do so would be wholly futile since such laws are common, of long standing and are uniformly held valid and effective.

See:

United States v. Knott, 298 U. S. 544, 56 S. Ct. 902, 80 L. ed. 1321 (1936);

Blake v. McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed. 432 (1898) (particularly at 172 U. S. 257);

23 Am. Jur. 271;

23 Am. Jur. 467.

Petitioners, we are gratified to note, appear to concede that the interests of Wisconsin creditors will be best subserved by a liquidation of the Wisconsin securities in Wisconsin. They also state that there is a substantial surplus of assets held in Wisconsin over contract liabilities to residents of that state and also surpluses in certain other states. We should point out that this is a wholly incorrect statement for the reason that the deposit in Wisconsin and in certain other states exceeds only what is known as the "net cash liability" in those states on Fidelity's outstanding contracts. When it is borne in mind that contract holders had to make monthly payments for a period of eleven months or one year before there was any "net cash liability" on such contracts, it may be readily appreciated that the actual liability of Fidelity to contract holders in any particular state is in no way measured by "net cash liability." The Circuit Court of Appeals correctly relegated such contentions to the realm of "possibilities without substantial showing" (R. 385).

This case is in no sense a case where a debtor in need of rehabilitation is being denied relief under Chapter 10 needful and beneficial both to itself and its creditors. Instead, the sole question presented is whether the Central Trust Company in Charleston, West Virginia should liquidate and distribute the trust funds set up and administered in the various states for many years, or whether the state authorities to whom the contract holders have always looked shall perform that function.

We must point out that throughout the entire proceedings the federal trustee took a position of extreme hostility toward those creditors represented in person and represented by state authorities who opposed the so-called

reorganization proceedings. The trustee now complains that it has not had time, due to this litigation, to formulate proposed plans of reorganization.

It was not proper for the trustee to occupy itself in this litigation. Under Section 77B it was held that a trustee appointed in such proceedings was not concerned with the merits of the petition or its dismissal. *Loomis v. Gila Co.*, 101 F. (2d) 827 (C. C. A. 9th, 1939); petition for re-hearing den. 103 F. (2d) 312; cert. den. 307 U. S. 643, 59 S. Ct. 104, 83 L. ed. 1524. Indeed, it is our understanding that one of the prime purposes of the passage of Chapter 10 was to insure a disinterested trustee. Vigorous objection was made during the hearing to the trustee's participation on behalf of those who desired the continuance of the federal proceedings (T. 65, 77, 3615, 3625). We contend upon the same considerations as moved us then that the federal trustee has no proper place as a petitioner for certiorari in this court.

It must further be noted that of the debtor's present counsel two, namely John V. Ray and Homer A. Holt, are regularly employed as counsel for the Central Trust Company, the federal trustee. As was pointed out to the Circuit Court of Appeals, the law firm of Mr. John V. Ray is "general counsel" for Central Trust Company, and Mr. Holt disclosed at the bar of the Circuit Court of Appeals in connection with the application for stay of mandate that his law firm was also regularly employed as counsel by Central Trust Company and had in fact been consulted by it in its private interest during the course of the present proceedings in matters affecting those proceedings. Mr. James R. Fleming, who originally filed the petition on the part of debtor, withdrew on September 17, 1941 during the

course of the hearing on the answers controverting the debtor's petition, and has taken no active part in any of the proceedings since that time. Mr. Ray's first appearance was on September 17, 1941 and Mr. Holt's first appearance was on the application for stay of mandate in the Circuit Court of Appeals.

If we understand the provisions of Sections 156, 157 and 158 of Chapter 10 correctly, the position of the trustee in this case does not square with the standards therein set forth.

After the interests of contract holders in Wisconsin and Iowa and elsewhere have been for years looked after at public expense and deposits have been made to secure their contracts, the Central Trust Company of Charleston, West Virginia now steps forward professing concern and anxiety for the interests of Fidelity's creditors. It insists that it, and not the state authorities, shall liquidate the deposited assets and distribute the proceeds. It must be pointed out that none of the state authorities complied with the ex-parte turn-over orders entered by the District Court on June 6th and June 19th, 1941, which orders were later rescinded under date of August 9, 1941. We are not as yet quite sure whether the federal trustee contemplates conducting a so-called re-organization proceeding without benefit of possession and control over the assets of the company, practically all of which are in the hands of the state authorities as trust deposits. Perhaps if on some theory the petition for reorganization were ultimately sustained, it would contemplate suits of some type to secure possession of these assets. This would, of course, have the effect of endlessly prolonging the litigation in connection with the purported federal reorganization proceedings and,

as does the prosecution of the present petition, would further jeopardize the interests of Fidelity's contract holders by subjecting the securities securing their contracts to the risk of further depreciation in the unsettled markets of today.

In states such as Wisconsin and Iowa where the remaining deposited securities are of the highest grade and readily salable, it would seem fantastic, as it must have seemed to the Circuit Court of Appeals, to suggest that the contract holders secured by such deposits could be benefited by a "slow and orderly liquidation" in federal court. With respect to such securities what is obviously needed is a *speedy* and orderly liquidation. In states where the type of assets on deposit dictates another course, we must assume, as did the Circuit Court of Appeals, that such states will adopt the method of liquidation best suited to produce the most for contract holders.

Petitioners propose that the more than six thousand contract holders in Wisconsin and Iowa, whose interests have up to the present time been diligently looked after by the state authorities, shall now be thrown upon their own devices and presumably shall retain counsel to press their claims against the assets deposited in trust for their benefit in Wisconsin and Iowa in the far-off District Court in Charleston, West Virginia.

These facts all point to the correctness of the decision of the Circuit Court of Appeals that the interests of creditors would be best subserved in the prior state proceedings and that the granting of a writ of certiorari in this case would only serve to continue the period of speculation and hazard to which the contract holders are presently being subjected.

E. The determination of the rights of contract holders in the trust funds securing their contracts in the various states is exclusively a question of state law to be determined by the state courts, and the state court proceedings should not be further delayed

It is likely, as suggested by petitioners, that questions will arise as to the respective rights of contract holders in any one state as to their proper share of the trust funds in that state. The deposit laws of Wisconsin and Iowa and the other states are a part of a complete scheme for the supervision of corporations of Fidelity's type in each of these states. The trusts created in the respective states by these laws are for the benefit of resident creditors therein. The right of any contract holder in Wisconsin or Iowa to a share in the fund there is necessarily a question of Wisconsin or Iowa law. The deposits have been and are located in Wisconsin and Iowa. Were this proceeding to be continued in the federal court, recent decisions of this court would indicate that the federal court would be required to submit questions as to the construction of the Wisconsin, Iowa and other state laws not yet decided by the courts of these states to the state courts. *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 60 S. Ct. 628, 84 L. ed. 876 (1940).

In fact, although the Circuit Court of Appeals in this case made no decision upon this point, it may be forcefully contended that where state authorities assert jurisdiction under statutes such as involved here, the federal court should dismiss the petition on this ground alone. See *Pennsylvania v. Williams*, 294 U. S. 176, 55 S. Ct. 380, 79 L. ed. 841 (1935); and as cited in *Securities and Exchange Commission v. United States R. & Imp. Co.*, 310 U. S. 434, 60

S. Ct. 1044, 84 L. ed. 1293 (1940), to the effect that its principles are imported into the application of the Chandler Act by the federal courts.

See also:

Gordon v. Ominsky, 294 U. S. 186, 55 S. Ct. 391, 79 L. ed. 848 (1935);

Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 55 S. Ct. 386, 79 L. ed. 850 (1935);

Kelleam v. Maryland Casualty Co., 312 U. S. 377, 61 S. Ct. 595, 85 L. ed. 899 (1941).

The principle of *Railroad Commission of Texas v. Pullman Co.*, 321 U. S. 496, 61 S. Ct. 643, 85 L. ed. 971 (1941), is, we believe, also closely related to the principles expressed in the foregoing cases and to the principles involved in this case. As said in the opinion there (321 U. S. 500):

> "* * * Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies; * * * This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers. * * *"

If it is proper and necessary for the state courts in any event, as we believe it is, to determine the application of their particular state laws to the trust deposit of debtor's assets located in such states and the sole purpose of the federal proceeding is a liquidation of some sort, then it is clear that the federal proceedings are only duplicitous and unnecessary, and there can be no possible quarrel with the decision of the Circuit Court of Appeals that the prior proceedings best subserve the interests of Fidelity's creditors.

III. THE PETITION SHOULD BE DISMISSED FOR FAILURE ON THE PART OF PETITIONERS TO PRINT AND SERVE A RECORD IN COMPLIANCE WITH THE RULES OF THIS COURT

The petitioners have served us with what purports to be a printed record of this case but which in fact contains only a fragmentary part of the record and much material which is not of record. The abridgement which has been served upon us consists of the appendices attached to the briefs in the Circuit Court of Appeals plus the proceedings in that court including the opinion.

Under the rules of the Circuit Court of Appeals for the Fourth Circuit the original stenographic transcript made by the court reporter in the District Court is filed, as are the pleadings, exhibits and other matter of record. Parties to an appeal may place in the appendices of their briefs such portions of the testimony and such exhibits as they desire to call to the attention of the court in original form. Other matters, such as statutes relied upon in the argument, may also be placed in the appendices. The printing of an appendix is entirely optional and may be dispensed with if desired, and two of the parties, namely, the trustee and the Missouri appellant, printed no appendices to their briefs filed in the Circuit Court of Appeals.

It is not necessary that testimony be set out in an appendix to a brief filed in the Circuit Court of Appeals for the Fourth Circuit. Under the rules references may be made to the original transcript where no particular stress is desired with respect to the exact context of testimony. In preparing the Wisconsin and Iowa brief for the Circuit Court of Appeals it was not felt that the case was suited

to extensive use of quoted testimony in the appendix and consequently our appendix contained no testimony. It contained the opinion of the District Court, one of the exhibits filed in the case and statutes of the states of Wisconsin and Iowa and other states, to which reference was made in the argument.

Some of the other briefs, however, contained excerpts of the testimony found in the original transcript. Many of these excerpts have no particular significance except in connection with the briefs to which they were attached and in which reference thereto was made. Moreover, a great part of the material found in the various appendices relates to questions raised by certain of the parties in the Circuit Court of Appeals but which were not decided by that Court.

It may be fairly said that aside from such references to the testimony as are made in the opinions of the District Court and the Circuit Court of Appeals, there is very little factual material contained in the record which has been served upon us, which is of the least assistance in determining the issues raised upon the petition for certiorari. Such matter as is presented upon these issues in the record as printed by petitioners is for the most part matter which was included in the appendix to the debtor's brief filed in the Circuit Court of Appeals in support of its position there. It is thus one sided. The fact that respondents chose to print very little of the evidence upon these issues in their appendices thus operates to their disadvantage under the scheme petitioners have adopted as to the record. In fact, petitioners in the printed record submitted here have failed to print in its entirety the matter contained in the appendix to the Wisconsin brief filed in the Circuit Court of Ap-

peals. Page 65 of that appendix, containing a schedule of securities liquidated in Wisconsin prior to the commencement of the federal proceedings and showing the prices obtained therefor, is for some reason omitted completely. We may also note that the so-called record does not even contain the pleadings in the case.

So far as we are advised, no respondents other than the Wisconsin and West Virginia respondents and possibly Maryland are in possession of a copy of the original stenographic transcript of the testimony taken in the District Court. None of the respondents are in possession of the exhibits in the case, of which there were 123, some of them consisting of hundreds of pages. Speaking for ourselves, we can say that we have been handicapped in the preparation of our brief by the failure of the petitioners to prepare and serve an adequate record, and we can well sympathize with the position of those respondents who do not even have a copy of the transcript of testimony in the District Court.

As we understand Rule 38 of this Court, where a record has not been printed for the use of the court below, as is the case here, a petitioner for certiorari must print the complete record in the case and serve it upon the respondents within the period prescribed by Section 8 of the Act of February 13, 1925 (28 U. S. C. A., sec. 350), or, if it is desired to omit from the printed record matter not essential to a consideration of the questions presented by the petition for the writ, a stipulation should be entered into between counsel for the omission of such matter. No such stipulation has been entered into in this case, although the Wisconsin respondent advised counsel for petitioners by

telegraph on July 27, 1942 that the Wisconsin respondent would expect to be consulted directly by petitioners if any abridgement of the record were contemplated. We have received no acknowledgment, direct or indirect, of our telegram, and we have not been approached at any time for a statement of our views as to what the record should contain. We may say further that we have been advised that other respondents have likewise been completely ignored with respect to any views which they might have in the preparation of a record.

Rather than printing a complete record or approaching the respondents with a view to obtaining a satisfactory abridgement by stipulation, counsel for the petitioners have proceeded to print the fragmentary record with which we have been served and have also served us with a copy of a motion addressed to this Court asking that the petition for certiorari be considered upon the basis of the record printed by them.

It is our view that the motion is not timely. By the time it can be considered the time for filing respondents' opposing briefs will have expired and the time in which petitioners are permitted to file their petition, including a copy of the printed record, will have expired.

We would also oppose petitioners' motion, if in fact it is to be considered by this Court, for the reason, as we have already stated, that the printing of appendices to certain of the briefs filed in the Circuit Court of Appeals does not with any degree of completeness place before this Court and in the hands of these respondents a record of the evidence material to a consideration of the petition for the writ upon the questions decided by the Circuit Court of

Appeals. Had petitioners evinced a desire to stipulate as to the record, we feel quite certain that such portions of the record as are material to a consideration of the petition could have been printed and would not have exceeded in length or cost the material which petitioners have printed as the record on the petition.

The creditors have been put to additional and unnecessary expense by the printing of a record consisting for the most part of matters wholly irrelevant to a consideration of the petition upon the questions decided by the Circuit Court of Appeals, and have likewise been prejudiced in the presentation of their position in opposition to the writ. Under the circumstances we believe petitioners' motion must be denied and the petition should be dismissed for failure to have the record printed and served in accordance with the rules of this Court.

CONCLUSION

Upon the foregoing considerations it is respectfully submitted that the petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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APPENDIX

11 U. S. C. A., sec. 22:

"(a) Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this title as a voluntary bankrupt.

"(b) Any natural person except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this title.

"* * *"

11 U. S. C. A., sec. 72a:

"a. The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee so appointed fails to qualify as herein provided, the court shall make the appointment. If the bankrupt is a face-amount certificate company, as defined in section 80a-4 of Title 15, the court alone shall make the appointment; but the court shall not make such appointment without first notifying the Securities and Exchange Commission and giving it an opportunity to be heard."

11 U. S. C. A., sec. 107 (f):

"(f) (1) For the purposes of, and exclusively applicable to, this subdivision f (a) 'debtor' shall mean a face-amount certificate company as defined in section 80a-4 of Title 15; (b) 'face-amount certificate' shall mean a face-amount certificate as defined in section 80a-2 of Title 15; (c) 'depositary' is a person or State agency with whom securities or other property of a debtor is deposited or to whom property of a debtor is transferred, in trust or otherwise, pursuant to the requirements of a State law or an agreement by the debtor providing for the distribution of such property or its proceeds to creditors or security holders of the debtor in the event of the insolvency of the debtor or under other specified circumstances; (d) 'deposit creditor' is a creditor who, under the provisions of a State law or agreement providing for a deposit with or transfer to a depositary, has rights as to the securities or property so deposited or transferred which exceed the rights of a general creditor; and (e) 'State agency' is an official or agency of a State designated to act as depositary or to distribute property, or the proceeds of property held by a depositary.

"(2) Every deposit or transfer of securities or other property made by or on behalf of a debtor with or to any depositary for the benefit or protection of or to secure the holder of any security sold by or on behalf of the debtor on or after January 1, 1941, shall be voidable as against the trustee of such debtor if the property of the estate is insufficient for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor, and such deposit or transfer and every lien created thereby shall thereupon be avoided by the trustee subject to the provisions of paragraph 3 of this subdivision f.

"(3) In the event any deposit or transfer described in paragraph 2 of this subdivision f shall be avoided the trustee shall segregate the property received by the trustee from the depositary and charge the same with the costs and expenses of maintenance and liquidation and distribute the net proceeds thereof to the creditors who would have been entitled thereto under the provisions of the law or agreement providing for the deposit or transfer of the property, and each such creditor shall thereafter be entitled to dividends from the estate only after all creditors of the same rank shall have received the same percentage.

"(4) The court shall have summary jurisdiction of any proceedings to hear and determine the rights of any parties under this subdivision f and to hear and determine the sufficiency of the property of the estate for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor. Due notice of any hearing in such proceedings shall be given to every depositary and State agency which is a party in interest.

"(5) Where the provisions of subsection (c) of section 28 are not applicable, the provisions of this section will not apply."

11 U. S. C. A., sec. 506 (3):

"For the purposes of this chapter, unless inconsistent with the context—

"* * *

"(3) 'corporation' shall mean a corporation, as defined in this title, which could be adjudged a bankrupt under this title, and any railroad corporation excepting a railroad corporation authorized to file a petition under section 205 of this title;"

11 U. S. C. A., sec. 544:

"If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied."

11 U. S. C. A., sec. 546:

"Without limiting the generality of the meaning of the term 'good faith', a petition shall be deemed not to be filed in good faith if—

"(1) * * *

"(2) * * *

"(3) it is unreasonable to expect that a plan of reorganization can be effected; or

"(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding."

15 U. S. C. A., sec. 80a-3 (c) (3):

"(3) * * *

"(c) Notwithstanding subsections (a) and (b), none of the following persons is an investment company within the meaning of this subchapter and sections 72(a) last sentence, and 107 (f) of Title 11:

"(1) * * *

"(2) * * *

"(3) Any bank or insurance company; * * *"

15 U. S. C. A., sec. 605i:

"As used in sections 605e to 605j the term 'insurance company' shall include any corporation engaged in the business of insurance or in the writing of annuity contracts, irrespective of the nature thereof, and operating under the supervision of a State superintendent or department of insurance in any of the States of the United States. As used in this section and in sections 605e, 605f, and 605g of this title, the term 'State' means any State, Territory, or possession of the United States, the Canal Zone, and the District of Columbia:"

26 U. S. C. A., sec. 801 (a):

"(a) Definition. When used in this chapter the term 'life insurance company' means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds."